Nos. 23-726, 23-727

In the Supreme Court of the United States

MIKE MOYLE, SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, ET AL., PETITIONERS

v.

UNITED STATES

IDAHO, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* PROFESSORS KENT GREENFIELD, ADAM STEINMAN, JULIE C. SUK, AND JOSEPH THAI IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal scholars with expertise in federal courts, federal jurisdiction, and the Supreme Court and its procedure. This brief takes no position on the merits of this case but addresses a procedural issue. *Amici* have an interest in the proper interpretation and application of this Court's jurisdiction and procedure. They offer this brief to assist the Court in evaluating the exercise of its discretion.

Amici file this brief solely as individuals, and institutional affiliations are given for identification purposes only.

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

Civil Procedure and has authored two books and dozens of articles on constitutional law.

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* * * * *

INTRODUCTION

The Court should dismiss the writ of certiorari as improvidently granted so that the Court may instead await its usual opportunity for "final review" on a developed factual record, following a completed appellate process. As granted, the writ instead demands that this Court sit as one of "first view" in an interlocutory, emergency posture to decide, in the first instance, and without an adequately developed factual record: (1) how an Idaho law amended *after* the lower courts ruled in this case intersects with EMTALA; (2) a sweeping question of EMTALA's ability to preempt *any* state laws prohibiting abortion (though the question below was limited to Idaho law); and (3) novel issues of constitutional dimension not even raised—much less ruled on—below. Acquiescing to Petitioners' request disregards the appellate process and this Court's historic role in it.

STATEMENT OF THE CASE

1. In 2020, Idaho enacted § 18-622, a so-called "trigger" law that would outlaw abortion in the state within 30 days of this Court's judgment overruling *Roe* v. *Wade*. That law, referred to by the Idaho Supreme Court as a "Total Abortion Ban," *Planned Parenthood Great Nw.* v. *State*, 522 P.3d 1132, 1147 (Idaho 2023),

made it a criminal offense to perform an abortion, punishable by up to five years in prison, Idaho Code § 18-622(2) (2022). In June 2022, the law was triggered by this Court's decision in *Dobbs*.

As of August 2022, Idaho law defined abortion to include "the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman." *Id.* § 18-604(1). Idaho Code § 18-622 also defined criminal abortion broadly, even including abortion for patients who were the victims of rape or incest as well as any abortion "necessary to prevent the death of the pregnant woman." *Id.* § 18-622(3). The law did provide an affirmative defense to physicians charged under the law. *Id.* To prevail on that defense, a physician would have to prove by a preponderance of the evidence at a criminal trial that she "determined, in [her] good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman." *Id.* § 18-622(3)(a)(ii).

2. Idaho Code § 18-622, in the form it took as of August 2022, prompted this case. The United States sought a declaratory judgment and injunction on the grounds that, as applied, § 18-622 was preempted by EMTALA. In a span of three weeks, the parties briefed the United States's motion for a preliminary injunction and submitted evidence. The evidence submitted by both parties centered primarily on three issues related to the law on the books at that time.

First, the parties hotly disputed how the then-written Idaho law viewed the treatment of ectopic pregnancies. Three physician declarants detailed how an ectopic pregnancy may require emergency termination

as treatment but would nevertheless meet the statutory definition of a "clinically diagnosable pregnancy." J.A. 30–32, 41–44; 45–87; 606–611; 618. The Legislature's evidence, on the other hand, disputed those claims. According to two of their physician declarants, an ectopic pregnancy is a life-threatening condition, but treating it through surgery would not constitute an "abortion" under Idaho law. J.A. 547; 564–566. Idaho nonetheless conceded that treating an ectopic pregnancy with an abortion was criminalized under the then-written law. C.A. Leg. E.R. 3-298–299. The parties' divergent positions with respect to the law's treatment of ectopic pregnancies dominated much of the factual record submitted to the district court.

Second, several physician declarants laid out the dissonance between Idaho's necessary-to-prevent-death standard for the affirmative defense and medical reality. These physicians (and the United States) understood the Idaho law to require physicians asserting the affirmative defense to prove with objective medical certainty that death was imminent. That standard, they said, was impossible to meet. The evidence meticulously cataloged many conditions that would seriously jeopardize the patient's health or life if left untreated. J.A. 32–38. According to several physicians, however, an emergency-room physician still may be unable to know with objective certainty that the pregnant patient will die in the absence of treatment. J.A. 32–38; 375; 593–595; 599–601; 605–607, 609–610. Thus, physicians told the district court that there are "no medical 'bright lines,'" J.A. 595, and that in the real world, there is not a "dichotomous variable" between a patient likely dying and the patient likely living, J.A. 375. Meanwhile, physicians supporting

Petitioners disputed the United States's evidence, testifying that a physician could make the good-faith medical judgment that terminating the pregnancy was necessary to prevent the death of the pregnant patient. *See* J.A. 512–526, 544–548, 566–583.

Third, the evidence focused on the affirmative defense. Several physicians testified at length about how the threat of prosecution for every abortion they perform, with the only defense being one that they could prove at trial years later, would skew physicians' medical decisions. J.A. 359, 362–363; 369–370; 601; 618. It would also delay urgent, medically indicated emergency care, as physicians would either need to seek out legal advice before intervening or be forced to wait until the risk of death became more imminent. J.A. 39–40; 359, 361–363; 601–603.

3. On that factual record, the district court held that the United States had established a likelihood of success on the merits of its as-applied federal preemption claim and preliminarily enjoined Idaho's total abortion ban to the extent it conflicted with EMTALA. *United States* v. *Idaho* (*Idaho I*), 623 F. Supp. 3d 1096 (D. Idaho 2022).

First, the district court found that it was impossible for a physician simultaneously to comply with EMTALA and Idaho law. *Id.* at 1108–1110. For instance, because of the structure of Idaho's affirmative defense, the district court concluded that a physician would still be charged with a crime even if they terminated a pregnancy to save the pregnant patient from imminent death. *Id.* at 1109. The court also found that there were several conditions that would not necessarily lead to the death of the pregnant patient but would still require an emergency abortion. *Id.* at

1104–1105, 1109–1110. Chief among those conditions was ectopic pregnancies. *See id.* at 1103–1104, 1109–1111. Lastly, the district court found that the scope of Idaho's affirmative defense was "tremendously ambiguous" given "the realities of medical judgment." *Id.* at 1110.

Second, the district court found that even if compliance with both laws was technically possible, Idaho's total abortion ban stood as an obstacle to EMTALA's objective and thus was preempted. Relying on the record evidence, the district court found that the law, as it then existed, would deter Idaho physicians from performing abortions that they believed to be medically necessary to stabilize patients with emergency medical conditions. *Id.* at 1112–1113. That finding rested on both the affirmative-defense-only structure of the law and the realities of medical judgment. Because physicians could depend on their medical judgment that the abortion was necessary to save the life of the patient only as an affirmative defense, they risked indictment, arrest, detention, and trial for every abortion they performed. *Id.* at 1112, 1113 n.4; *see id.* at 1109. And because the court interpreted Idaho's affirmative defense to require an objective certainty that death was imminent absent an abortion, *see id.* at 1109–1110, it also found that in many cases it would be impossible for a physician to know whether that standard was met, *id.* at 1112–1113.

4. Five months after the district court's ruling, the Idaho Supreme Court announced an interpretation of Idaho law that varied significantly from the district court's reading. *Planned Parenthood Great Nw.* v. *State*, 522 P.3d 1132 (Idaho 2023). First, the Idaho Supreme Court applied a "limiting judicial construction"

to the law so that terminating an ectopic pregnancy is not prohibited. *See id.* at 1203 (holding that removing ectopic pregnancies is "not within the definition of 'abortion' as criminally prohibited by the Total Abortion Ban"). The court further held that the necessary-to-prevent-death standard was a subjective one, "focusing on the particular physician's judgment," and did "not require objective certainty, or a particular level of immediacy." *Id.*

The law changed again six months later, this time by legislative action. The Idaho Legislature codified the Idaho Supreme Court's limiting construction for ectopic pregnancies into the statutory definition of abortion. 2023 Idaho Sess. Laws 298 (codified at Idaho Code § 18-604(1)), Leg. Br. App. 53. It also amended the criminal provision to transform what had been the necessary-to-prevent-death affirmative defense into a statutory exception to the crime. *Id.* (codified at Idaho Code § 18-622(2)).

5. Just as the amended law took effect, Petitioners appealed the district court's order granting the preliminary injunction of the pre-amendment law to the Ninth Circuit. The Legislature, but not Idaho, sought a stay of the district court's injunction from the Ninth Circuit. A panel granted the stay, *United States* v. *Idaho* (*Idaho II*), 83 F.4th 1130 (9th Cir. 2023), but the *en banc* court quickly vacated the panel opinion and denied the motion for a stay, *United States* v. *Idaho* (*Idaho III*), 82 F.4th 1296 (9th Cir. 2023); J.A. 710. At Petitioners' request, the court of appeals scheduled an expedited *en banc* argument. C.A. Dkt. 73. But before it could hear argument and issue its decision on the merits of the preliminary-injunction appeal, Petitioners applied to this Court for an emergency stay. This

Court granted the stay and treated the application as a petition for certiorari before judgment and granted the petition.

SUMMARY OF ARGUMENT

I. This Court has long viewed itself as "a court of final review and not first view." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam)). That rule "promote[s] respect" for the adjudicatory process, *Adarand Constructors*, 534 U.S. at 110 (quoting *Adams* v. *Robertson*, 520 U.S. 83, 92, n.6 (1997) (per curiam)), and ensures that the Court does not frame "broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances," *Illinois* v. *Gates*, 462 U.S. 213, 224 (1983). In contravention of these customary limitations on this Court's discretion, Petitioners ask this Court to sit as a court of first view in at least three significant ways.

A. First, no court has had the opportunity to consider evidence about how the now-amended Idaho law and EMTALA intersect. The law today bears little resemblance to the law that the district court considered when granting the preliminary injunction. Idaho law has since been changed twice, first by the Idaho Supreme Court's interpretation and then by the Idaho Legislature's amendment. The district court's ruling relied on a factual record developed and tailored to address issues that may not be as relevant to the preemption analysis today, such as the pre-amendment law's treatment of ectopic pregnancies. In short, no court—state or federal—has had the opportunity to consider

whether the amended Idaho law, as it exists today, is preempted.

B. Second, the Petitioners have substantially expanded the issues to be considered by this Court. Below, Petitioners framed the question as one of fact: whether there were any circumstances in which Idaho's law would conflict with EMTALA's mandate to provide a medically necessary abortion. Now, Petitioners ask this Court for a sweeping pronouncement that EMTALA does not preempt any state laws that prohibit abortion.

C. Third, Petitioners' sweeping request stands on a host of legal arguments never considered below. These novel and weighty constitutional questions—from Tenth Amendment issues to the major-questions doctrine—were not raised to the district court before its preliminary-injunction ruling, and they were not passed on by even the Ninth Circuit panel's now-vacated decision, much less by the Ninth Circuit *en banc*.

D. The extraordinary posture of this case underscores the fact that the Court's review of this interlocutory order is premature. With an amended law now in place, a new factual record may emerge, leading to new legal theories about how the amended law impacts the delivery of emergency medical care in Idaho. Those developments could drastically narrow or change the scope of the Court's review or obviate that review entirely.

E. This Court should not rule on such weighty constitutional issues in this emergency posture. This case is unlike those in which this Court has granted review before the court of appeals has had the opportunity to consider the record and arguments. Nor is there any

need for this Court to do so as there is no disarray among the federal courts.

In sum, taking up Petitioners' request to review a preliminary determination that (1) has never been adjudicated on the merits, (2) has many factual gaps in the record, and (3) involves a law that effectively no longer exists would disregard the Court's "own appellate processes, which serve both to constrain and legitimate the Court's authority." *Merrill* v. *Milligan*, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting), *stay vacated*, *Allen* v. *Caster*, 143 S. Ct. 2607 (2023) (Mem.).

ARGUMENT

I. The Court Should Dismiss the Writ of Certiorari as Improvidently Granted.

The grant or denial of a writ of certiorari lies squarely in this Court's discretion. *See Hammerstein* v. *Superior Court of Cal.*, 341 U.S. 491, 492 (1951). "Because certiorari jurisdiction exists to clarify the law, its exercise is not a matter of right, but of judicial discretion." *City & Cty. of S.F.* v. *Sheehan*, 575 U.S. 600, 610 (2015) (quoting U.S. SUP. CT. R. 10). Thus, where "due regard for the controlling importance of observing the conditions for the proper exercise" of the Court's "discretionary jurisdiction" warrants it, "the writ of certiorari should be dismissed as improvidently granted." *Magenau* v. *Aetna Freight Lines, Inc.*, 360 U.S. 273, 285 (1959).

Dismissing a petition as improvidently granted is particularly appropriate where it has become clear that the case presents a poor vehicle to decide the question presented. *See, e.g.*, *Jones* v. *Hildebrant*, 432

U.S. 183, 185–187 (1977) (holding that a shift in posture of the case by petitioner at oral argument all but mooted the question presented in the petition).

A. There is no factual record about current Idaho law.

Petitioners ask this Court to take first view of a sweeping new issue on a factual record developed to address a law that has since changed substantially.

The district court's decision rested in substantial part on an understanding that Idaho law: (1) criminalized abortions of ectopic pregnancies, (2) provided an exception for life-saving treatment only through an affirmative defense, and (3) required physicians relying on that affirmative defense to show with objective medical certainty that the pregnant patient's death was imminent. For example, the district court relied on ectopic pregnancies as the quintessential example of impossibility preemption where an abortion would be required by EMTALA but forbidden by Idaho law. *See Idaho I*, 623 F. Supp. 3d at 1103–1104, 1110. The district court also relied on the objective nature of the affirmative defense to find that the then-in-effect Idaho law would deter medical care required by EMTALA. *Id.* at 1112. And it relied on the affirmative-defense structure to conclude that the Idaho law criminalized care required by EMTALA, *id.* at 1109, and that the law would deter physicians from providing EMTALA-required care, *id.* at 1112. In sum, the district court's order relied, necessarily, on its assessment of facts relevant to "Idaho's criminal abortion statute, as currently drafted" in August 2022. *See id.* at 1112.

The law today is substantially different from the law that the district court considered when evaluating

what facts were relevant and how the law should be applied in light of those facts. After the district court ruled, the Idaho Supreme Court pronounced that terminations of ectopic pregnancies are not abortions and that the necessary-to-prevent-death standard is to be evaluated subjectively rather than objectively—though even a physician's subjective opinion can be second-guessed by testimony from "other medical experts on whether the abortion was, in their expert opinion, medically necessary." *Planned Parenthood Great Nw.*, 522 P.3d at 1203–1204. Then, the Idaho Legislature amended the law, codifying the Idaho Supreme Court's approach to ectopic pregnancies and changing the necessary-to-avoid-death standard from an affirmative defense to a statutory exception. 2023 Idaho Sess. Laws Ch. 298 (codified at Idaho Code §§ 18-604(1)(c), 18-622(2)), Leg. Br. App. 53.

No court has had the opportunity to consider any evidence about how the amended Idaho law will affect decision-making by physicians in Idaho. The district court's analysis instead was based on a factual record trained on then-in-effect Idaho law. For example, the district court relied on physician declarants who testified that then-Idaho law would prohibit or impede their ability to deliver stabilizing care under EMTALA in emergency circumstances that were not yet, but could become, imminently life-threatening conditions. At the time of the preliminary-injunction ruling, the Idaho Supreme Court had not yet ruled that the standard for reviewing necessary-to-prevent-death decision-making was subjective—though subject to rebuttal. Accordingly, there was no evidence about whether this subjective-but-rebuttable standard makes any difference for physicians on the ground providing emergency medical care in Idaho.

Similarly, the district court relied heavily on testimony by physicians about how the Idaho law's affirmative-defense-only structure would affect their ability to deliver required medical care. But there is no evidence about how the new statutory exception, rather than the old affirmative defense, influences physicians' decision-making processes. In short, no court has heard any evidence about what circumstances may require EMTALA-mandated treatment that would be prohibited or impeded by Idaho's amended statute. *Cf.* St. Luke's Health System Amicus Br. 4–5, 16–19, 21–22. As a result, this Court does not have a sufficiently relevant factual record upon which to determine how EMTALA and Idaho law intersect today for purposes of a preemption analysis.

This Court does not usually resolve questions of such dimension without an adequate factual record. *See Brown* v. *Chote*, 411 U.S. 452, 457 (1973) (deferring review of the "grave, far-reaching constitutional questions presented" on interlocutory review of a preliminary injunction where the "case clearly reflects the limited time which the parties had to assemble evidence and prepare their arguments"); *Hidalgo* v. *Arizona*, 583 U.S. 1196, 1201 (2018) (Breyer, J., concurring) (explaining that issues are better suited for certiorari when the necessary facts have been fully developed in the courts below); *see also, e.g.*, *Nike, Inc.* v. *Kasky*, 539 U.S. 654, 664–665 (2003) (Stevens, J., concurring) (concurring with the majority's decision to dismiss a writ as improvidently granted where the correct answer to questions integral to the case was "more likely to result from the study of a full factual record"). That rule applies with even greater force to Petitioners' proposed facial challenge here, as this Court has cautioned that grounding facial rulings

on mere "factual assumptions" and "speculation" risks premature interpretation. *See Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

The risks of ruling on the now-stale factual record are not hypothetical. According to the Legislature in the proceedings below, the "preeminent issue here is one of fact, whether in the real world EMTALA actually conflicts with the 622 Statute." Dist. Ct. Dkt. 65 at 2. Even in this Court, both Idaho and the Legislature raise fact-bound arguments about what possible medical conditions may require a physician to perform an abortion under EMTALA that is also prohibited by Idaho law—a question that no court has had the opportunity to consider.[2] Idaho Br. 31; Leg. Br. 30. The Legislature even goes one step further: it disputes the district court's factual conclusions on the evidence presented. Leg. Br. 30 (disputing the district court's conclusion that "the Legislature's witnesses were simply wrong"). But far from establishing, as it must, that these conclusions are clearly erroneous, *see Glossip* v. *Gross*, 576 U.S. 863, 881 (2015), the Legislature merely suggests that there is a "better view of the facts," *Cooper* v. *Harris*, 581 U.S. 285, 299 (2017)

[2] Petitioners (Idaho Br. 31; Leg. Br. 30) fault the United States for not presenting evidence about what conditions would conflict with an Idaho law that had not yet been interpreted by the Idaho Supreme Court or amended by the Legislature. But when the governing law moots a case, this Court does not foreclose raising a "residual claim under the new framework that was understandably not asserted previously." *Cf. N.Y. State Rifle & Pistol Ass'n* v. *City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 482–483 (1990)). Instead, it ordinarily permits a plaintiff on remand to "amend their pleadings or develop the record more fully." *Cf. id.*

("[T]he very premise of clear error review is that there are often 'two permissible'—because two 'plausible'—'views of the evidence.'" (quoting *Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1985))). Even in the Legislature's own telling then, the district court's factual findings should not be disturbed.

B. Petitioners have expanded the questions on appeal.

This case originated from the United States's challenge to the pre-amendment version of § 18-622. The arguments underpinning Idaho's and the Legislature's opposition to that challenge at the district court and the Ninth Circuit focused primarily on the interplay between EMTALA and § 18-622. At the certiorari stage, Idaho expanded the scope of the inquiry to address "whether EMTALA preempts state [abortion] laws . . . like Idaho's Defense of Life Act." Appl. 22. Even so, the arguments remained generally focused on Idaho.

Petitioners now advance a more extensive argument in their opening merits brief, asking this Court to determine broadly whether EMTALA "preempts state abortion regulations and requires hospitals to perform abortions disallowed by state law." Idaho Br. i. To rule on this expanded question, which was neither considered nor ruled on in the order that is now under review, the Court would need to analyze the extent to which EMTALA preempts *all* state laws that restrict or otherwise limit abortion access, without any factual record developed beyond the district court record addressing a prior version of Idaho law.

This Court has repeatedly cautioned litigants against "smuggling additional questions into [the

case]" after the grant of certiorari. *Irvine* v. *California*, 347 U.S. 128, 129 (1954). Under this Court's Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." U.S. SUP. CT. R. 14.1(a). Strict adherence to that rule "helps ensure that [the Court is] not tempted to engage in ill-considered decisions of questions not presented in the petition." *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 34 (1993). The Court typically considers "questions not raised in the petition only in the most exceptional cases." *Id.* at 28.

This Court recently dismissed a similar case as improvidently granted in *Arizona* v. *City & County of San Francisco*, where Chief Justice Roberts highlighted in his concurring opinion issues militating against review. *See* 142 S. Ct. 1926, 1928–1929 (2022). There, the Court granted certiorari to address a procedural issue but ultimately dismissed the writ when it became evident that "a great many issues beyond the question [for which certiorari was granted] . . . could stand in the way of the [Court] reaching the question presented on which [the Court] granted certiorari, or at the very least, complicate [the Court's] resolution of that question." 142 S. Ct. at 1928.

Here, like *City & County of San Francisco*, it is evident that "a great many issues beyond the question" for which certiorari was granted would impede any attempt to answer Petitioners' request for a broad interpretation of EMTALA. Most notable among these "great many issues" is the dearth of evidence adduced concerning Idaho's amended statute, its impact on doctors, patients, and stakeholders, or similar evidence from any other state. This lack of factual development

renders this case a poor vehicle to address even those questions Petitioners presented in their request for certiorari, let alone the broader questions about the parameters and outer boundaries of EMTALA that Petitioners now thrust upon this Court in their merits briefing. *See, e.g.*, *Visa Inc.* v. *Osborn*, 580 U.S. 993 (2016) (dismissing writ as improvidently granted where "'[h]aving persuaded us to grant certiorari on [one] issue, however, petitioner chose to rely on a different argument' in their merits briefing" (citation omitted)); *Rogers* v. *United States*, 522 U.S. 252, 259 (1998) (O'Connor, J., concurring) ("As the plurality points out, we granted certiorari to address an important issue of constitutional law, and we ought not to decide the question if it has not been cleanly presented.").

"This Court has repeatedly emphasized that "[a] question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein." *Izumi Seimitsu*, 510 U.S. at 31–32 (quoting *Yee* v. *Escondido*, 503 U.S. 519, 537 (1992)). Questions about how the laws of other states could interact with EMTALA in a host of unknown circumstances may be "related" or even "complementary" to the issues set forth in the certiorari petition, but are not "fairly included therein," particularly given the focus on Idaho law and the lack of any similar attention paid to the laws of other states. *Id*. This case does not turn on the interpretation of any other state's abortion laws, or how EMTALA interacts with them. Instead, this case has arrived before this Court with a record built on what a prior iteration of Idaho's law required and restricted, and whether it conflicted with EMTALA's stabilizing treatment requirement. Consideration of related questions—such

as how other state laws might interact with EMTALA—would not assist this Court in determining whether the United States is entitled to a preliminary injunction of *Idaho's* law. In short, EMTALA's preemptive effect on states nationwide is neither fairly included in the ruling under review nor set forth with any detail in the petition granted. Consideration of those questions could lead to an "ill-considered decision" predicated on a thin factual and legal record. *See Izumi Seimitsu*, 510 U.S. at 34.

C. Petitioners present new arguments not tested below.

If presenting an expansive new set of issues was not enough, Petitioners also ask this Court to address and resolve several legal arguments not raised or ruled on below, and which bear little resemblance to the narrow set of issues addressed by the district court in its preliminary-injunction ruling. Largely revolving around the broad question of whether EMTALA can require abortions, Petitioners' new arguments include that: (1) EMTALA requires only necessary stabilizing treatment that is authorized under state law; (2) EMTALA's requirement of stabilizing care for the "unborn child" reveals that EMTALA does not require abortions; (3) EMTALA does not allow the federal supervision of medical standards; (4) the Hyde Amendment bars the United States's interpretation of EMTALA; (5) the Tenth Amendment limits EMTALA's reach; and (6) the major-questions doctrine applies. *See* Idaho Br. 19–25, 31–32, 34; *see also* Leg. Br. 22–35, 38–45, 53.[3]

[3] Idaho and the Legislature made some of these arguments in their motions for reconsideration, but arguments made for the

However, as a court of "final review" not "first view," *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam)), this Court "does not ordinarily decide questions that were not passed on below," *City & Cty. of S.F.*, 575 U.S. at 609; *see also Adarand Constructors*, 534 U.S. at 109. This rule "'promote[s] respect'" for the Court's "'adjudicatory process'" and ensures that the Court will not be "tempted to engage in ill-considered decisions of questions not presented in the petition" and not considered below. *Adarand Constructors*, 534 U.S. at 110 (quoting *Adams* v. *Robertson*, 520 U.S. 83, 92, n.6 (1997) (per curiam)). And it ensures "that a factual record will be available to [this Court], thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances." *Gates*, 462 U.S. at 224. Resolving these new arguments would be "ill-considered" for three reasons.

First, these new arguments improperly expand the scope of the issues Petitioners presented to the lower courts. What started as a relatively narrow and largely fact-based argument concerning the scope of Idaho's then-in-effect law has transformed into a

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first time at reconsideration are not preserved for appellate review. *Cf. Banister* v. *Davis*, 140 S. Ct. 1698, 1703 (2020) ("Courts will not address [in motions for reconsideration] new arguments or evidence that the moving party could have raised before the decision issued"); *Mitchell* v. *Wisconsin*, 139 S. Ct. 2525, 2546 (2019) (Sotomayor, J., dissenting) (admonishing the plurality for "recklessly" taking on an issue that a party had waived and even conceded in the courts below). The Ninth Circuit panel did not pass on these issues.

broad-based request that this Court issue an expansive ruling interpreting the metes and bounds of EMTALA more globally.

An illustration of the progression is instructive:

(1) At the district court, Petitioners effectively conceded that *some* forms of abortion care must be provided under EMTALA and were permissible within the Idaho law's paradigm—a concession ostensibly made in response to declarations from doctors submitted by the United States identifying circumstances where an abortion was necessary to save the life of a patient. J.A. 641–645; *see also supra* 3–4.

(2) At the Ninth Circuit, Petitioners' argument was slightly broader but nevertheless remained generally cabined to the gap between EMTALA and what Idaho law, interpreted at the time, required or allowed. J.A. 699–704.

(3) Now, Petitioners advance several novel and broad arguments urging this Court to conclude that EMTALA's stabilizing treatment mandate can *never* require abortion care if state law bans abortions. *See* Idaho Br. 23–24 ("EMTALA does not require hospital emergency rooms to become abortion enclaves in violation of state law"); *id.* 31, 36–37.

The changing nature of Petitioners' arguments militates in favor of this Court dismissing the writ of certiorari as improvidently granted. *See, e.g.*, *United States* v. *United Foods*, 533 U.S. 405, 417 (2001) ("Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, it is quite a different matter to allow a petitioner to assert new substantive

arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." (citation omitted)); *see also Visa*, 580 U.S. 993.

Second, Petitioners' new arguments together urge this Court to issue a broad ruling on EMTALA and federalism issues largely divorced from the record below. Accepting that invitation risks resolving untested arguments in a vacuum and producing a decision that could take "any one of a number of different paths," none of which will necessarily resolve this case. *Nike*, 539 U.S. at 660 (Stevens, J., concurring).

This risk is heightened by the unclear picture left in the wake of the amendment to Idaho's law, which leaves several questions unanswered that this Court is not in a position to resolve without further factual development by the lower courts. For example, Petitioners here debut arguments concerning the proper scope of "stabilizing treatment" under EMTALA. 42 U.S.C. § 1395dd(b)(1). Likewise, several of the arguments Petitioners advance rely on EMTALA's interaction with state laws extending beyond Idaho. Resolving these arguments without the benefit of a well-developed factual record concerning how the now-amended Idaho law, let alone laws from other states, interacts with EMTALA could spur future challenges that grow out of these uncertainties. Even in this case, if the Court resolves any one of the new arguments presented by Petitioners, future proceedings—which will develop a new factual record trained on the now-amended Idaho law—could still create new issues that end up back at this Court's doorstep.

Third, the astounding breadth of Petitioners' new arguments creates a high degree of uncertainty as to the precise issues addressed below and, in turn, requires this Court to untangle varying interpretations. *See, e.g.*, *New York* v. *Uplinger*, 467 U.S. 246, 248–249 (1984) (dismissing writ as improvidently granted where the "diverse arguments presented in the briefs" demonstrated the "varying interpretations" of the court of appeals' decision and left the Court "uncertain as to the precise federal constitutional issue the court decided"). For example, Petitioners argue on the one hand that EMTALA does not "override other state laws" or "mandate any specific services or standard of care," while arguing on the other that this Court "need only decide whether EMTALA requires abortions that Idaho law forbids" and that no "practical conflict between EMTALA and [§ 18-622]" exists. *See* Idaho Br. at 29–33. Apart from seemingly asking this Court to rule on questions it need not reach, *see Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring in judgment) ("If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more."), these conflicting arguments highlight the "uncertain" nature of the precise question Petitioners are asking this Court to answer, *see Uplinger*, 467 U.S. at 248–249. Are Petitioners asking to broadly extend their reading of EMTALA to all state laws? Are they asking this Court to find that Idaho law does not conflict with EMTALA, and thus vacate the preliminary injunction? Are they asking for a ruling indicating that EMTALA can *never* require abortions? Do they want this Court to do all of the above? It is simply unclear. And it is not this Court's job to sift through Petitioners' briefs and pick the best arguments for reversal. *Cf. Mitchell*, 139 S. Ct. at

2546 (Sotomayor, J., dissenting) ("[T]his Court is not in the business of volunteering new rationales neither raised nor addressed below." (citations omitted)).

D. Petitioners ask for interlocutory review of a record so unsettled the very law at issue has since been amended.

The petition should be dismissed as improvidently granted because this Court is being asked to rule on: (1) a preliminary determination (2) limited to the United States's likelihood of success (3) challenging a law that has since been amended (4) relying on a record that is still evolving both in terms of facts and in terms of arguments.

For these reasons, the Court's review of this interlocutory order is premature. *See Brown*, 411 U.S. at 457 (deferring review of preliminary injunction where the "case clearly reflects the limited time which the parties had to assemble evidence and prepare their arguments"). With an amended law now in place, the United States may well develop a new factual record and new legal theories about how the amended law affects emergency medicine in Idaho. Those developments could dramatically narrow or change the scope of the Court's review or obviate that review entirely. *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 136–138, 147–148, 158 (2019) (detailing how premature review of preliminary rulings risks "that a dispute that might have seemed grave and intractable at first blush is able to be fully and adequately resolved by the lower courts").

Where, as here, Petitioners arrive in an "interlocutory posture" with no final judgment, and "it remains unclear" what further developments may emerge in the courts below, the Court has previously denied certiorari. *See Mount Soledad Mem'l Ass'n* v. *Trunk*, 567 U.S. 944, 945 (2012) (statement of Alito, J.) (agreeing that the petition should be denied in a case arising in an "interlocutory posture" "[b]ecause no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take").[4]

Moreover, this Court resolves the constitutionality of a statute on an interlocutory appeal only "in rare cases . . . where the constitutional issues are clear." *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 786 n.1 (1986) (White J., dissenting) ("[T]his is by no means the preferred course of action in the run of cases"), *overruled on other grounds by Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992). And, even on those rare occasions when the Court has taken this approach, its review has been limited only "to the particular order under review." *See Whole Woman's Health* v. *Jackson*, 595 U.S. 30, 38

[4] Further, the Legislature's status in the litigation—and ability to raise arguments—is murky at best. *See Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."). The Legislature was granted intervention only to "present[] evidence and arguments" about "'the holes in the factual foundation' of the United States' motion." Dist. Ct. Dkt. 27 at 1; *see also* Dist. Ct. Dkt. 75 (denying Legislature's motion for leave to file a brief containing legal arguments). That ruling is on appeal at the Ninth Circuit, but this Court is reviewing only the interlocutory order appealed from the preliminary injunction.

(2021) ("As with any interlocutory appeal, the Court's review is limited to the particular order under review. . . . In this preliminary posture, the ultimate merits question . . . is not before the Court"); *New Haven Inclusion Cases*, 399 U.S. 392, 435 (1970) ("That we have granted certiorari to the Court of Appeals in advance of the appellate court's judgment does not alter the fact that our task is limited." (quoting *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486, 498 (1968)) (internal quotation marks omitted)).

If the Court views the issue presented as one of "imperative public importance," U.S. SUP. CT. R. 11, then the issue deserves at least a reasoned ruling based on arguments thoroughly examined by the lower courts, *see, e.g.*, *United States* v. *Haymond*, 139 S. Ct. 2369, 2385 (2019) ("[T]he wiser course lies in returning the case to the court of appeals for it to have the opportunity to address the government's . . . argument in the first instance"); *Mount Soledad Mem'l Ass'n* v. *Trunk*, 573 U.S. 954, 955 (2014) (statement of Alito, J.) (because the Court of Appeals has not yet reviewed the district court's order on appeal, "any review by this Court can await the decision of the Court of Appeals"); *Spears* v. *United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting) ("We should not rush to answer a novel question" that "could benefit from further attention in the court of appeals . . . in the absence of a pronounced conflict among the circuits."); *Yee*, 503 U.S. at 538 ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." (citation omitted)); *United States* v. *Mendoza*, 464 U.S. 154, 160, 163 (1984) (describing "the benefit [this Court] receives from permitting . . . courts

of appeals to explore a difficult question before this Court grants certiorari" (citation omitted)).

Having plucked this case before allowing the Ninth Circuit to rule *en banc*, this Court should not rush to answer a question, the answer to which has not yet been informed by the appellate process.

E. The risk of an erroneous ruling outweighs the exigencies.

Leapfrogging the court of appeals' review is "an extraordinary remedy," *United States* v. *Higgs*, 141 S. Ct. 645, 646 (2021) (Breyer J., dissenting), deployed only in the most exigent circumstances that "justify deviation from normal appellate practice and . . . require immediate determination in this Court," *see* U.S. SUP. CT. R. 11.

As a result, the Court has granted certiorari before judgment in extreme cases. *See e.g.*, *Dep't of Com.* v. *New York*, 139 S. Ct. 2551, 2565 (2019) (the census questionnaire needed to be finalized for printing in time for the decennial census); *Dames & Moore* v. *Regan*, 453 U.S. 654, 660 (1981) (resolving lower courts' conflicting conclusions to allow the United States to avoid breaching an executive agreement); *United States* v. *Nixon*, 418 U.S. 683, 687–688, 691–692 (1974) (avoiding undue delay in grand jury proceedings that named the sitting President as an unindicted co-conspirator and served subpoenas to the President), *superseded by statute on other grounds as recognized by Bourjaily* v. *United States*, 483 U.S. 171, 177–179 (1987); *Reid* v. *Covert*, 354 U.S. 1, 3–5 (1957) (resolving the constitutionality of court martial proceedings against civilians); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 583–584 (1952) (a steel-workers

strike "immediately jeopardize[d] our national defense" during the Korean War because steel production was crucial to the war effort); *Ex parte Quirin*, 317 U.S. 1, 19–20 (1942) ("to preserve unimpaired the constitutional safeguards of civil liberty" and to avoid any delay in reviewing military jurisdiction over Nazi spies during World War II).

This case does not similarly "demand prompt resolution." *See Dames & Moore*, 488 U.S. at 668; *see also* U.S. SUP. CT. R. 11. Given the continued evolution of the record and the amendments to Idaho's law, prudence instead warrants dismissal of this case so that the lower courts can fully flesh out any potential constitutional issues. In fact, it is simply impossible to know, as Petitioners urge, whether "many" state laws are at risk of preemption by EMTALA. Idaho Br. 40. No record has been developed about those states' laws, and those laws are not before this Court. Only one other circuit court has thus far addressed the issue of EMTALA's preemptive effect, and no other cases raising similar issues are pending. And so, there is no "disarray" among the lower federal courts on this issue, despite Petitioners' claims. *See Mistretta* v. *United States*, 488 U.S. 361, 371 (1989) (granting certiorari because of the disarray among the federal district courts).

With the facts and arguments in this case still in their infancy, the Court instead risks framing "broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances." *Gates*, 462 U.S. at 224. Further, review by this Court at such a preliminary stage would effectively provide Petitioners with two bites at the apple. If Petitioners lose, they still could advance new claims below based

on the amended law and a new factual record. If they prevail, they will likely face new challenges from the United States that endeavor to keep the case alive. In either scenario, the risk that this Court will see this case once again is significant. Indeed, a ruling by this Court that upholds the lower court's injunction may not apply to the law as now constituted.

In sum, ruling now on this interlocutory, evolving, and unexplored record "does a disservice to [the Court's] own appellate processes, which serve both to constrain and legitimate the Court's authority." *Merrill* v. *Milligan*, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting), *stay vacated*, *Allen* v. *Caster*, 143 S. Ct. 2607 (2023) (Mem.). Dismissing this writ of certiorari as improvidently granted allows the appellate process to function as it should, ultimately presenting the Court an opportunity for "final review" instead of demanding of it a "first view," which it nearly always refuses to, and ought not, provide. *See Zivotofsky*, 566 U.S. at 201 (quoting *Adarand Constructors*, 534 U.S. at 110).

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted.

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